BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Jurisdiction

The grounds of jurisdiction stated in the petition, which is printed in this brief, will suffice and for the sake of brevity will not be here reprinted.

II.

Statement of the Case

The facts pertinent of the question presented are stated in the petition and in the interest of brevity are not repeated here.

III.

Specification of Error

The error which the Petitioner will urge if the writ of certiorari is issued is as follows:

The Court of Appeals for the Fifth Circuit, which affirmed the judgment of the District Court for the Western District of Texas erred in not reversing and remanding the judgment for a new trial.

Argument

The Honorable Fifth Circuit Court in an opinion by Mr. Justice Holmes has decided (a) that "since it is clear that Holt's injury resulted from a danger created solely by the negligence of the employees of an independent contractor" and (b) "since the work

being done was of a character not intrinsically dangerous, if skillfully performed, the company was not shown to have violated any duty delegable or otherwise owed to the Appellant."

The Honorable Fifth Circuit Court also said in the course of its opinion that Petitioner relied upon only two propositions of law and we respectfully call to the attention of this Court that we relied on four principles of law, the last two of which were thoroughly discussed in our Supplemental Brief, which was filed after oral argument was had in this cause; and due to the fact that we sincerely believe that the Fifth Circuit Court is wrong in its decision, we ask this Honorable Court to grant the petition for certiorari and to consider these two additional propositions, due not only to the importance of this matter to this seriously injured man, but also due to the importance of this question to hundreds of thousands of workmen who must toil in the future engaged in the performance of the type of work that Holt was engaged in.

In other words, if this decision stands, an employer can sublet his contract, when he has dangerous work to perform, to an insolvent sub-contractor and thus evade all responsibility with the tragic consequences that will often follow.

However, there are many Texas authorities to support our view that Holt would never have been injured had Hudler not sent him back to this spot where unexploded dynamite had remained on the premises for at least 24 hours, even if we assume that it was left there by the independent contractor. Of course,

if it had been left by the defendant's employees, it would be immaterial as to how long it had remained there. Hudler not only complained of the work to the crew, but under the contract, if he had any complaint to make, it should have gone to the contractor, himself. He went further than this, and directed them to go about leveling off this portion of the ditch in a manner certain to cause injury.

The Circuit Court says further that the company had no knowledge of the danger and yet, under the newly discovered evidence of Jett, they did have knowledge. In Texas and in all other states, constructive knowledge is the equivalent of actual knowledge. This is fully established by Vol. 35, Am. Jur., Section 129. It is elementary that if the evidence was sufficient to raise the issue of constructive knowledge, then the question of whether the defendant should have discovered and removed the dynamite becomes a jury issue.

This is the plain effect of the decision cited by Respondent in *Wilton v. City of Spokane*, 132 Pac. 404, which incidentally involved an injury arising from an unexploded charge of dynamite.

The holding that the work was not intrinsically dangerous because the blasting was to be done on open prairie lands is absolutely in conflict with and repelled by the decision in *Seismic Exploration v. Dobray*, 169 SW (2) 739. The holding in that case which repels that contention and shows that the blasting here involved was intrinsically dangerous is set out in our petition.

The fact remains that ever since the decision in *Erie Ry. Co. v. Tompkins*, 114 A. L. R. 1487, by the Supreme Court of the United States, it is the law of Texas that must be applied as the Supreme Court said in that case on page 1492: "Except in matters governed by the Federal Constitution or the acts of Congress, the law to be applied in any case is the law of the State, and whether the law of the State shall be declared by its Legislature in a statute, or by its highest court in a decision is not a matter of Federal concern. There is no Federal General Common Law."

However, the Fifth Circuit Court apparently recognizes that where the work is inherently dangerous, the rule of collateral negligence has no application.

The Fifth Circuit Court in the footnotes of the opinion cites the quotation from Tex. Jur. in support of the contention that the blasting here was not intransically dangerous, but in the Dobray case, supra, the distinction is clearly shown and where sufficient dynamite is required to blast rocks, then the work is intrinsically dangerous, and out-of-state decisions holding otherwise, we respectfully submit, should not control the decision of this Honorable Court. Even as to the out-of-state decisions there are distinguishing facts and circumstances such as the order of Hudler and evidence charging the defendant with constructive knowledge of the presence of the dynamite on their premises, which are here involved, and was not involved in any of the cases cited in the footnotes of the opinion.

The Fifth Circuit Court has given the decision in Loyd v. Herrington a construction, which we respect-

fully submit is unwarranted. The negligence here was not at all collateral. The injury resulted from the order of Hudler to Holt to go back down and dig out this dynamite. The Supreme Court said in the Herrington case, 182 SW (2) 1003: "In determining the liability of this Petitioner, the only important inquiry is whether the injury resulted from the nature of the inherently dangerous work and whether it should reasonably have been anticipated by the parties."

In the Texas Bar Journal of December, 1944, under annotations, the Chairman of the Insurance Section of Texas, the Honorable Wm. Ryan of Houston, Texas, apparently gives the case the same construction as the writer. I quote from page 411 of the Texas Bar Journal: "Since it is admitted that the dynamite cap in question was affixed to the motor of the truck as a prank by an employee of the independent contractor, it is obvious that there is no liability on Loyd unless the case comes within the rule that an employer is liable for the negligent acts of an independent contractor with respect to the performance of work which is inherently dangerous. That rule applies only to the actual performance of work, however, and has no application to an injury resulting from an act or fault purely collateral to the work and which arises entirely from the wrongful act of the independent contractor or his employee. The injury to the plaintiff in this case did not result directly from the work which had been authorized to be done and would not have occurred at all except for the prank played by the employee of the independent contractor. The rule invoked

by Plaintiff is not applicable because the injury should not have been reasonably anticipated by the parties."

In the case at bar, can it be said that it was not reasonably foreseeable by Hudler, who knew that dynamiting had been done along the premises where he was sending the crew back to dig out the mounds, and who knew that unexploded shots had been discovered in the vicinity, that if the pick struck an unexploded cap that an explosion would occur? Is this not an injury arising from the actual performance of the work? Doesn't the Supreme Court, itself, recognize that the work in the Herrington case was inherently dangerous by their very opinion?

The Fifth Circuit Court, we respectfully submit, when it holds that the work involved here was not inherently dangerous is in direct conflict with the decisions referred to.

We further respectfully submit that the Supreme Court did not in any wise refute that portion of the opinion by the Fort Worth Court of Civil Appeals in the Herrington case that held that where dynamite was involved, the work was inherently dangerous. The Fort Worth Court of Civil Appeals said, speaking through Justice Speer (178 SW (2) 700):

> "It is the settled rule in Texas that a master who employs inherently dangerous instrumentalities for the consummation of his contract is charged with the duty of exercising a very high degree of care in the use and custody of these instrumentalities, to prevent injury to others; and when he entrusts such dangerous articles to his employees, or others performing the contract for him,

their negligence will be imputed to the master. Atex Construction Co. v. Farrow, Tex. Civ. App. 71 SW (2) 323, writ refused.

"In this connection appellant pleaded and here contends that since it was stipulated that he sublet his contract to build the road in Stephens County to Johnson, an independent contractor, and Johnson's employees did the acts complained of by appellee, appellant cannot be held liable therefor. The general rule in such situations is not applicable in cases of the nature here involved. The exception to that rule arises when the contract directly requires the performance of a work intrinsically dangerous, however skillfully it may be performed. This is true because the original contractor is the author of the mischief resulting from it, whether he does the work himself or lets it to another. Cameron Mill & Elev. Co. v. Anderson, 98 Tex. 156, 81 SW 282, 1 L. R. A. N. S. 198. Similar are the principles announced in Kampmann v. Rothwell, 101 Tex. 535, 109 SW 1089, 17 L. R. A. N. S. 758; El Paso Electric Co. v. Buck, Tex. Civ. App. 143 SW (2) 438, writ refused, want of merit."

In conclusion, in support of our position here that the work is intrinsically dangerous and that hence, a recovery should be allowed, we desire to quote briefly from the case of *Pittsburgh, C. & St. L. Ry. Co. v. Shields*, 24 N. E. 658, in which the Court said in part:

"The law requires of persons having in their custody instruments of danger that they should keep them with the utmost care. 1 Hil. Torts, (3rd Ed.) 127. 'Sometimes,' says Pollock, 'the term "consummate care" is used to describe the amount

of caution required; but, he says, 'it is doubtful whether even this be strong enough. At least we do not know any English case of this kind (not falling under some recognized exception) where unsuccessful diligence on the defendant's part was held to exonerate him.' (Pol. Torts, 407.) See also Whart., Neg., Section 851. And it stands to reason that one charged with a duty of this kind cannot devolve it upon another, so as to exonerate himself from the consequences of injury being caused to others by the negligent manner in which the duty in regard to the custody of such an instrument may be performed. Speaking of the absolute duty imposed by statute in certain cases, or also, the duties required by common law 'of common carriers, of owners of dangerous animals, or other things involving, by their nature or position, special risk or harm to neighbors', Pollock observes: 'The question is not by whose hand an unsuccessful attempt was made, whether that of the party himself, of his servant, or of an "independent contractor," but whether the duty has been adequately performed or not.' Pol., Torts, 64. We in no way limit nor question the soundness of the general rule which exonerates the master from liability for the acts of his servant done outside of his employment. What has been stated is strictly within the reason and principle of the rule, which is that whatever the servant is intrusted by the master to do for him must be done with the same care and prudence that would be required of the master acting in that regard for himself. If it be the custody of dangerous instruments, he must observe the utmost care. The inability of the master to shift the responsibility connected with the custody of dangerous instruments, employed in his

business, from himself to his servants intrusted with their use, is analogous to, and may be said to rest upon, the same principle as that which disenables him from shifting to an independent contractor liability for negligence in the performance of work that necessarily tends to expose others to danger, unless the work is carefully guarded. It seems by the great weight of authority, and reason that this cannot be done. See R. R. Co. v. Morey, 47 Ohio St.,—ante 269, and cases there cited. Also see Lawrence v. Shipman, 39 Conn. 586, 589; and Cooley, Torts, (2d Ed.) 644, 646. And the relation of master and servant, and that of employer and independent contractor, are, in this regard, treated in one view by Pollock in his work on Torts, as will appear from consulting his work at page 64."

Corpus Juris states the rule clearly in Vol. 39, p. 1288, Sec. 1483, note 41. The rule there is compared by analogy to the relationship of employer and independent contractor as follows:

"Analogy to relation of employer and independent contractor.—In respect of work necessarily dangerous 'the inability of the master to shift the responsibility connected with the custody of dangerous instruments, employed in his business, from himself to his servants entrusted with their use, is analogous to, and may be said to rest upon the same principle as that which disenables him from shifting to an independent contractor, liability for negligence in the performance of work that necessarily tends to expose others to danger, unless the work is carefully guarded. It seems *by the great weight of author-*

ity and reason that this cannot be done.' Pittsburgh, etc., R. Co. v. Shields, 47 Oh. St. 387, 393, 24 N. E. 658, 21 Am. St. R. 840, 8 L. R. A. 464. See also infra 1540 et seq."

Again it is said in the well considered case of *Barmore v. Vicksburg*, 38 So. 210:

"An attempt has been made, in a very few illogically reasoned cases, to draw a distinction between instrumentalities 'dangerous in themselves' and those 'dangerous by reason of improper use,' and confine the master's liability to cases due to mismanagement of the former class alone. An analysis will show that the distinction is more imaginary than real, and too refined to be of any practical benefit as a method of determining legal responsibility."

In conclusion, *the invitee here occupies the same position as a customer in a store.* Judge Thompson in his work on Negligence, Section 680, said: "On the other hand, the servant of the contractor must be deemed on the premises of the proprietor by invitation, express or implied, and therefore owes him the same duty of guarding him against the consequences of hidden dangers on the premises that a proprietor would in any case owe a guest, a customer, or any other person coming by invitation on his premises."

Section 968 of the Thompson's Commentaries on the Law of Negligence, and Section 979 thereof, are specially recognized as presenting the controlling rules in an enlightening opinion by Justice Sharpe of the Supreme Court of Texas, in the case of *Montgomery v. Houston Textile Mills*, 45 SW (2) 140.

We also refer this Honorable Court to Section 679 of Judge Thompson's work. *These rules of law recognized by the Supreme Court of Texas present one of the elements under which this Plaintiff is entitled to recover which has not even been considered by the Fifth Circuit Court.*

The application of the rules of law announced in American Jurisprudence were applied by Mr. Justice Alexander, now of the Supreme Court, in the case of *R. E. Cox Co. v. Kellogg*, 145 SW (2) 675. We quote from that case as follows:

> "The court submitted to the jury an issue as to whether prior to the accident, Cox had notice of the cases in the aisle. The jury answered the issue in the negative. In connection with said issue, the Court instructed the jury that by the term 'notice' was meant 'knowledge of such fact or facts as would put an ordinarily prudent person on inquiry, which inquiry, if followed with reasonable diligence, would lead to the discovery of the main fact, that is, the fact in question.' We must presume therefore that Cox not only had no actual knowledge of the existence of the cases in the aisle, but that said defendant did not have actual knowledge of any fact which would have put a reasonably prudent person on inquiry, but even though Cox had no such knowledge or notice, said defendant would be liable if the dangerous situation had existed long enough that a reasonably prudent person, in the exercise of ordinary care in looking after a store such as here under consideration, would have discovered and removed the dangerous situation, for while a storekeeper is not an insuror of the safety of his cus-

tomers while in his store, he is obligated to exercise ordinary care to keep the premises in a reasonably safe condition for their protection. 30 Tex. Jur. 871; 45 C. J. 837; Graham v. F. W. Woolworth Co., Tex. Civ. App. 277 SW 223; Texas-La. Power Co. v. Webster, 127 Tex. 126, 91 SW (2) 302, 306; Bustillos v. Southwestern Portland Cement Co., Tex. Com. App., 211 SW 929. The mere finding that Cox had no knowledge of any fact which, if reasonably pursued, would have led to a discovery of the defective condition does not acquit said defendant of negligence in failing to exercise ordinary care to discover such facts. A storekeeper must exercise some care to see that his store is kept in a reasonably safe condition for his customers, even though he has no actual knowledge of any fact that would lead him to believe that a dangerous situation existed. Consequently, we must determine whether there was sufficient evidence to show that the sample cases had been in the aisle in such position as to create a dangerous situation long enough that, by the exercise of ordinary care, Cox should have discovered and removed same prior to the accident."

Surely, this case proves conclusively that the Texas-New Mexico Pipe Line Company should have exercised some care to see that their premises were kept in a reasonably safe condition for their invitees *even though we assume that they had no actual knowledge of any fact that would lead them to believe that a dangerous situation existed* under the Texas holding in the Cox case supra.

In this case they not only knew that thousands of dynamite caps had been brought on the premises and

that a negligent method of exploding them, by the means of individual fuses, was being used; but they also knew and were charged with the knowledge that unexploded shots are often present, and had been discovered on the morning before Holt was injured.

We respectfully submit that under this last theory disregarding all others that a recovery should be had by the Petitioner. If this Honorable Court were presented with a situation wherein the proprietor of a store invited one to come into his store for the purpose of levelling ditches, after the independent contractor had brought thousands of dynamite caps on the premises—if this proprietor instructed this man who had no knowledge where the dynamiting had been done and who knew nothing about dynamite, to go back and dig out with a pick in a ditch containing mounds which indicated unexploded dynamite to an experienced eye (and the proprietor was charged under the law quoted in Am. Jur. with this knowledge), and if the proprietor knew that unexploded dynamite had been discovered on that very day in that very vicinity or area, and this fellow was so injured, *would there be any difficulty in determining whether the proprietor of the store was liable?*

We think not, and yet under the rules of law above set out if the invitee is entitled to recover in that case, the same rules of law apply here.

As said in the Restatement of the Law of Torts on page 944:

> "A possessor who holds the land open to others for his own business purposes must possess and

exercise a knowledge of the dangerous qualities of the place itself, and the appliances provided therein which is *NOT* required of its patrons."

The same rule applies to the invitee who works for the employer's benefit.

Under the evidence in this case Hudler is bound to have seen the mounds containing the unexploded dynamite or else he would not have sent Appellant and his coworkers back to dig them out.

Under the law as above announced and in keeping with the following decisions, it makes no difference if the presence of the mounds in the ditch did not indicate unexploded dynamite to Hudler; hence, the error of this Honorable Court in holding that the Defendant did not have knowledge of the danger.

In this connection see: *Boal v. Electric Stor. Battery Co.* (3rd Cir.), 98 F. (2) 815, 818 (6); *Maty v. Grasselli Chemical Co.* (3rd Cir.), 98 F. (2) 877, 880 (5). These cases hold that, with reference to the duty of the employer to exercise ordinary care to furnish a safe place for his work to be performed, "It makes no difference whether or not the defendant was actually aware of the danger for it is 'charged with the knowledge of * * * the nature of the constituents and general characteristics of the substance used in his business, so that he can give directions for the conduct thereof with ordinary safety to his servants performing the work with ordinary care.' "

As a matter or fact, the use of the words "inherently dangerous work if skillfully performed" is mis-

leading. The Supreme Court of Texas in *Loyd v. Herrington*, supra, quoted from 27 Am. Jur. 517, Sec. 39, thus defining inherently dangerous work as follows: "An employer is liable for injuries caused by the failure of an independent contractor to exercise due care with respect to the performance of work which is inherently or intrinsically dangerous. The theory upon which this liability is based is that a person who engages a contractor to do work of an inherently dangerous character remains subject to an absolute non-delegable duty to see that it is performed with that degree of care which is appropriate to the circumstances; or in other words that all reasonable precautions shall be taken during its performance."

In other words, the Supreme Court of Texas recognized that any work regardless of how dangerous if skillfully performed would probably not result in danger. The question is whether the work was of a character that would be attended with danger to others.

How can this Honorable Court say that it was not in the contract that work would be performed which was calculated to bring about danger to others if precautions were omitted?

What would be the danger if precautions were omitted from the handling of dynamite to one who had to level off the ditch if it was not unexploded dynamite?

The case of *North American Dredging Co. v. Pugh*, 196 SW 255, states the rule in Texas:

> "For liabiilty to attach to the employer of an independent contractor, it is not required that it be absolutely necessary that injuries to third per-

> sons will result from the doing of the work, but if the work is so inherently or intrinsically dangerous that injuries will probably be occasioned to third persons unless proper precautions are taken, the employer may be liable for such injuries, though primarily they are caused by the negligence of the contractor in failing to take the necessary steps to avoid the danger."

As a matter of fact, the negligent handling of explosives in Texas, such as dynamite, constitutes a nuisance and as said in the Texas case of *Moore and Savage v. Kopplin*, 135 SW 1033, this is an exception to the general rule exempting the employer of the independent contractor from liability since the owner or occupant of real property cannot suffer to be done on his premises a nuisance. Other Texas cases of like import are *McGuffey v. Pierce Fordyce Oil Ass'n.*, 211 SW 335; *Texas Refining Co. v. Sartain*, 206 SW 553.

The Supreme Court of Massachusetts, in the case of *Curtis v. Kiley*, 26 N. E. 421, made this pertinent statement:

> "When the owner of premises which are under his control employs an independent contractor to do work upon them which from its nature is likely to render the premises dangerous to persons who may come upon them by invitation of the owner, the owner is not relieved by reason of the contract from the obligation of seeing that due care is used to protect such persons. The owner cannot continue to hold out the invitation without being bound to exercise due care in keeping the premises reasonably safe for use according to the invitation."

And in this connection we desire to add the discussion by the Supreme Court of Louisiana in the case of *Lincoln v. Appalachian Corp. of Louisiana*, 146 La., 83 So. 364, 7 ALR 1697, in which the Court says:

> "Plaintiff was not the employee of the defendant in the strict sense, he having been employed as above indicated by the Boylon Detective Agency, who held the watching of the building under contract.
>
> "But its duty to him in providing proper tools and appliances and in furnishing a safe place to perform his duties was for all practical purposes the same as if he had been an employee, not because of any contractual relation, but because of the duty to use 'ordinary care' toward those who worked on its premises for its benefit and with its knowledge and consent. Cleveland C. C. & St. L. R. Co. v. Berry, 46 L. R. A. 52."

The handling and use of dynamite constitutes not only inherently dangerous work but in the great decision rendered in *Exner v. Sherman Power Construction Co.*, 54 F. (2) 510, it was held:

> "The liability of the defendant is not founded on illegal storage or on negligence, which was not proved, but upon the ground that the use of dynamite is so dangerous that it ought to be at the owner's risk."

This case further said:

> "We can see no reason for imposing a different ground of liability for the results of an explosion, whether the dynamite explodes when stored or when employed in blasting."

We respectfully submit that in this case there can be no different liability imposed for blasting regardless of whether the plaintiff is injured at the time of the blast or thereafter due to a missed shot since, as said in the Exner case, supra, "The explosion occurred from an act connected with a business conducted for profit and fraught with substantial risk and possibility of gravest consequences."

The Exner case has received favorable comment in 45 Harv. L. R. 594, 17 Corn. L. Q. 703, 80 U. of Pa. L. R. 924.

Conclusion and Prayer

In Peters v. George 154 F. 634, the identical order to that of Hudler which the Circuit Court said was not dangerous and did not constitute negligence is referred to as criminal carelessness.

A comparison of 35 Cor. Jur. Sec., pg. 242, with 25 Cor. Jur., pg. 197, will show weight of authority has changed so that Cor. Jur. Sec. now holds both employer and independent contractor liable in blasting cases.

Secundum cites Texas case *Cisco Ry. Co. v. Texas Co.*, 240 SW 990, a case where blasting occurred in the country. Secundum also cites *Watson v. Black Mountain Ry. Co.*, 80 S. E. 175. This is a case where blasting operations took place days previously and occurred from unexploded shots yet intrinsically dangerous doctrine was applied. Last Texas case, 169 SW (2) 739, refutes doctrine announced by Court. Reagan testified the only safe way to remove mounds in ditches would

be to re-explode dynamite, so Holt's job of levelling the ditch with pick and shovel was intrinsically dangerous since danger was hidden.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision for a new trial on the merits thereof.

Respectfully submitted,

THEODORE MACK
Fort Worth, Texas
JOHN J. WATTS
Crane, Texas
Attorneys for Petitioner
Ward Holt

Theodore Mack
of Counsel

A copy of the petition for writ of certiorari and brief in support thereof has been furnished to Eugene R. Smith of El Paso, Texas, attorney for Respondents.